

1955

December 14

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SEP 22 1998

CONCORD, N.H.

Mr. Adelard E. Cote, Commissioner  
Department of Labor  
Star Building  
Concord, New Hampshire

Dear Sir:

Your letter of December 1, concerning the William Jackson case has been received.

On February 25, 1955, Jackson sustained an accidental injury in the course of his employment. He has been unconscious and totally incapacitated since that time. It appears that Jackson's employer was subject to the Workmen's Compensation Act. (RSA 281:2, I) at the time of the accident, but had not furnished evidence of financial responsibility (RSA 281:9). Subsequently, on February 28, 1955, a Workmen's Compensation policy was filed. Petitions for compensation were brought in Cheshire County Superior Court, by Jackson's wife as next friend, against the employer and against the New England Box Company. On the telephone Miss Morgan referred to New England Box as being a sublessor of the immediate employer while your letter mentions "sub-contractor".

Before trial an agreement was reached by the parties involved. The employer has agreed to pay \$3,000.00, while New England Box offers \$1,250.00, a total of \$4,250.00.

This proposed settlement has been submitted to you for approval and you request our opinion on the following three questions:

1. Should the proposed agreement, submitted to you for approval, be treated as a request for approval of a lump sum settlement (RSA 281:33)?
2. Should the proposed agreement be approved by you as permitted in cases where you feel that it is in the best interest of all concerned (RSA 281:33)?
3. In the event that you approve the lump sum settlement would Jackson's dependents (RSA 281:12, VII) be entitled to compensation for death (RSA 281:22) if his disability results in death?

(1) The only reference to lump sum payments under the Workmen's Compensation Act is in RSA 281:33. See Bolduc v. Company, 96 N.H. 235, 239. Neither the Superior Court nor the parties acting independently of the Labor Commissioner have the authority to effect a binding lump sum compromise agreement. It follows therefore that the agreement submitted to you must be treated as a request for a lump sum settlement. Under RSA 281:33 such a settlement may be permitted in your discretion "when it appears to be in the best interest of all concerned."

(2) It is not possible for us to give a "yes" or "no" answer to the second question raised since in the final analysis you must exercise your own discretion in accordance with the provisions of the statute. We can, however, enumerate several factors which you might wish to take into consideration in exercising your discretion.

RSA 281:33 provides as follows: "Lump Sum Payments. Lump sum settlements may be permitted at the discretion of the commissioner of labor when it appears to the best interest of all concerned."

Judge Kenison pointed out in King v. Kniznick, 98 N.H. 247, 250, that "lump sum settlements may be the exception rather than the rule . . . and that the (Labor) Commissioner's discretion would ordinarily be exercised at a conference or hearing at which time the parties would be able to state the reasons for and against making a lump sum settlement."

We believe that the Judge's recommendation is especially pertinent to the problem which you are now considering. We would respectfully suggest that a hearing be held to assist you in determining whether the agreement in question is in the best interest of all concerned.

In the course of the hearing it probably would be helpful to obtain information on some of the following points:

(a) Is there any question as to whether disability is compensable under the act?

(b) If not, what is the maximum amount of compensation that could be awarded to Mr. Jackson?

(c) What is the exact relationship between Jackson's employer and the New England Box Company? i.e. Is there any chance that Jackson might be entitled to Workmen's Compensation benefits from the New England Box Co.? The latter's offer to contribute \$1,250.00 would seem to indicate that they believe that there is at least some possibility that they might be found liable.

(d) Was the Workmen's Compensation policy filed with your department on February 28, 1955, in effect at the time of the accident?

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(e) Was the employer in fact subject to the law at the time of the accident?

(f) Does the employer have a defense which would make compromise desirable from Jackson's point of view?

(g) If not, and if, in fact, the employee was not covered by insurance at the time of the accident, what is the financial status of the employer? If you find that the employer is not in the best financial condition, this would appear to be a factor to consider since a demand for the full amount provided under the act might have the effect of forcing the employer out of business or into bankruptcy, in which case, the employee might realize substantially less than the amount provided in the proposed agreement.

(h) What is the legal status of the employer? i.e. Corporation, partnership or individual.

While the factors hereinbefore enumerated are not intended to be a complete list of the considerations involved in exercising your discretion it is hoped that they may to some extent assist you in reaching a decision. If you believe that I could be of any assistance to you in this matter I will be glad to be present when the hearing in question is held.

(3) With respect to the effect of the lump sum settlement on Jackson's dependents' rights under the act in the event that he should succumb to his injuries we must respectfully advise that the question has not as yet, to our knowledge, been considered by the Supreme Court and that our answer must lack any degree of finality.

It is generally held that a dependent's right to death benefits is an independent right and is not derived from the rights of the deceased employee. 2 Larson Workmen's Compensation, 122 (s.64.00 Death Benefits). See also Hirsch v. Hirsch Brothers Inc., 97 N.H. 480. Accordingly it has been held by a majority of the courts considering the question that a compromise settlement executed by an employee prior to his decease cannot bar the statutory rights of his dependents arising on his decease. 2 Larson's Workmen's Compensation 124 (section 64.10).

It is noted that the petition in Superior Court was filed by Mrs. Jackson as wife and next friend. Apparently the proposed lump sum settlement has been executed in the same fashion. The right of the wife of an insane person to sue as next friend seems established in this jurisdiction. Carbonneau v. Germany, 96 N.H. 240, 242. It would seem unlikely that signing the compromise agreement in that capacity would waive her personal rights under the act as distinguished from her husband's rights. At least one case has held that the wife herself cannot join in a settlement disposing of her prospective rights to dependency since those rights do not come into existence until the employee dies. (Hart v. Gulf Casualty Co., - Texas - 1943, 170 S.W. 2d 491; contra: Wallace v. Lux Clock Co., 120 Conn. 280).

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It is recognized that the Workmen's Compensation statutes in the jurisdictions referred to above (both in the cases and in Larson) probably differ materially from the New Hampshire act. Indeed, several provisions of our statute might lend to the conclusion that a lump sum settlement executed on behalf of an employee would operate to cut off the rights of dependents under RSA 281:22. For the purpose of assisting you in determining the desirability of approving the lump sum settlement under consideration we would advise that there is a substantial chance that Jackson's wife or children may be entitled to further compensation in the event that Mr. Jackson does not survive.

Should this question come before you at a subsequent time and if a resolution of the question is necessary in order to reach a decision I believe that it would be appropriate to call it to our attention for further consideration and more detailed research.

Very truly yours,

Elmer T. Bourque  
Law Assistant

ETB/T